IN THE COURT OF APPEALS OF THE STATE OF ALASKA

GUY ALLAN NELSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11618 Trial Court No. 3AN-11-10048 CR MEMORANDUM OPINION No. 6345 — June 1, 2016

Appeal from the Superior Court, Third Judicial District, Anchorage, Philip R. Volland, Judge.

Appearances: Shelley K. Chaffin, Law Office of Shelley K. Chaffin, Anchorage, for the Appellant. Mary A. Gilson, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge ALLARD.

After representing himself at trial, Guy Allan Nelson was convicted of fourth-degree assault and felony furnishing alcohol to a minor based on allegations that

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

he provided alcohol to fourteen-year-old A.E. at Town Square Park in Anchorage, and then followed and assaulted A.E. when she left the park.

On appeal, Nelson raises a number of claims related to the pretrial representation by the Public Defender Agency and the Office of Public Advocacy, the voluntariness of his decision to represent himself, and several of the trial court's evidentiary rulings at trial. For the reasons explained below, we reject these claims and affirm the superior court's judgment.

Facts and proceedings

Around 1:00 a.m. on September 6, 2011, Michael Holmes was sitting on the back deck of his Anchorage apartment when he saw Guy Allan Nelson (a middle-aged man) and A.E. (a teenager) walking on opposite sides of the street below. When the two were almost in front of Holmes's balcony, Holmes heard A.E. say, "Get away from me," to which Nelson replied "I'm everybody's problem ... I'm not going to leave you alone." As the two walked past, Holmes watched from approximately forty meters away as Nelson, who had continued to trail A.E., "darted" across the street, placed A.E. in a headlock, and pulled her struggling to the ground.

Holmes ran to the scene. When he arrived moments later, A.E. was lying on her back, and Nelson, who A.E. had stabbed several times as they scuffled, was standing over her, bleeding heavily.

When police officers arrived, A.E. and Nelson offered different stories. Nelson admitted that he had been following A.E., but he asserted that he had done so because he wanted his property returned. Nelson claimed that several of A.E.'s acquaintances, with whom Nelson had been drinking earlier at Town Square Park, had stolen his alcohol and wallet and ridden away on bicycles. Because A.E. was the only

person left on foot, Nelson explained, he followed her in the hopes of reclaiming his property.

A.E. stated that earlier in the evening, around 9:00 p.m., she had met Nelson for the first time at Town Square Park while she was there with her boyfriend, William Keech, and several acquaintances. Nelson joined the group as its members passed around a bottle of alcohol and a pipe; at some point, Nelson pulled A.E. aside, offered her a cigarette, and attempted to befriend her. According to A.E., Nelson and Keech left the group together to purchase alcohol from a nearby liquor store, and returned with several bottles.

When Nelson and Keech returned, Nelson offered her alcohol that was clear and tasted like vodka. After she drank it, Nelson engaged A.E. in a conversation during which he proposed that A.E. pretend to be a prostitute and pursue a client. Nelson would then interrupt the transaction, pretending to be A.E.'s outraged father, and the two would extort money from the terrified client. A.E. rejected the scheme. Later in their conversation, Nelson offered A.E. five hundred dollars in exchange for sex, but A.E. rejected Nelson's advances.

A.E. left Town Square Park on foot at some point not long after Nelson propositioned her for sex. Nelson followed. At trial, A.E. testified that Nelson continued to walk behind her, harassing her and propositioning her for sex, until Nelson tackled her by Holmes's apartment.

Following his arrest, Nelson was charged with felony furnishing alcohol to a minor (Nelson had a prior furnishing conviction), failure to register as a sex offender, and fourth-degree assault.[1] The State later dismissed the failure to register charge.

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[1] AS 04.16.051(d)(1), AS 11.56.840, and AS 11.41.230(a)(1), respectively.

Prior to trial, Nelson was initially represented by an attorney from the Alaska Public Defender Agency (PDA) and then by an attorney from the Office of Public Advocacy (OPA). Both attorneys were forced to withdraw due to conflicts that developed during trial preparation. Following the appointment of a third attorney, Nelson chose to represent himself.

At trial, Nelson's defense was that he did not provide alcohol to A.E., and that there was no evidence A.E. was intoxicated that evening. Nelson also argued that A.E. was not a credible witness, and that A.E. had assaulted him by Holmes's apartment. The jury was instructed on self-defense.

The jury found Nelson guilty on both counts. Nelson now appeals.

Nelson's claim that the Public Defender Agency committed ineffective assistance of counsel when it withdrew from his case

Prior to trial, Nelson was appointed counsel from the Public Defender Agency. Nine months into the representation, the Agency moved to withdraw from Nelson's case based on a newly discovered conflict. Because of this conflict, the court appointed OPA to represent Nelson.

The nature of the conflict was not described in the motion to withdraw. However, it later appeared that the conflict related to the Public Defender Agency's prior or current representation of Keech (A.E.'s boyfriend), and the conflict would have been discovered sooner if an adequate conflict check had occurred.

Based on this record, Nelson now argues that the Public Defender Agency provided ineffective assistance of counsel — apparently on the ground that if the Agency had been more diligent in conducting its conflict check, it would have been Keech who was given an attorney from OPA, and Nelson would have remained represented by the Public Defender Agency.

This is a not a legally cognizable claim for ineffective assistance of counsel. Indigent criminal defendants are entitled to counsel at public expense, not counsel of their choice.[2] Nelson therefore did not have a right to an attorney from the Public Defender Agency; instead, he had a right to a competent conflict-free attorney at public expense — which he received through the appointment of the OPA attorney. Thus, even if Nelson could show that the Public Defender Agency was incompetent in its conflict check, he could not show that he was prejudiced by that incompetence.

Nelson's claim that the State violated his right to counsel by filing the Alaska Evidence Rule 404(b)(1) notice that ultimately led to the withdrawal of his OPA attorney

Nelson was indicted on December 30, 2011, for felony furnishing alcohol to a minor based on his prior furnishing conviction.[3] However, the State did not provide discovery on Nelson's prior furnishing conviction until six months after the indictment.

At that point, Nelson was represented by Assistant Public Advocate Evan Chyun, who subsequently moved to withdraw because the new discovery revealed a potential conflict — specifically, Chyun had previously represented the minor in that earlier case. Assistant Public Advocate Joseph Van De Mark later made clear that the conflict existed only if the State intended to call the minor as a witness in the new case. The next day, the State filed notice of its intent to rely on Nelson's previous furnishing case in its case-in-chief as a prior bad act under Alaska Evidence Rule 404(b)(1).

The trial court subsequently granted Chyun's motion to withdraw, reasoning that the minor might be called as a witness either at trial or at an evidentiary hearing on the 404(b)(1) motion.

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[2] *Coleman v. State*, 621 P.2d 869, 878 (Alaska 1980).

[3] *See* AS 04.16.051(d)(1).

However, the trial court later denied the State's 404(b)(1) motion without holding an evidentiary hearing. The court found that Nelson's prior conviction was too dissimilar, and too potentially prejudicial to be admitted in the State's case-in-chief. But the court noted that the State could make a renewed application to introduce the prior furnishing to a minor incident if Nelson opened the door to this evidence during trial.

Based on this record, Nelson now alleges that the State "la[y] in wait," delaying its decision to provide the Rule 404(b)(1) notice in order to deliberately strip Nelson of his appointed counsel on the eve of trial. Nelson also alleges that the State knew that its 404(b)(1) application was patently lacking in merit.

There is no evidence in the record before us that support these allegations of prosecutorial misconduct. These claims were not raised or litigated below, and the trial court was never asked to make findings on why the discovery was late, or to apply any sanctions against the State for any alleged misconduct in this case.

We therefore find no merit to this claim on appeal.

Nelson's claim that the trial court erred when it granted the OPA attorney's motion to withdraw

In a related argument, Nelson argues that the trial judge abused his discretion when he ruled on Chyun's motion to withdraw before the first ruling on the merits of the State's 404(b)(1) application. Nelson also argues that the court should have acted to "cure" its previous error by reappointing Chyun once the court denied the State's 404(b)(1) application.

We find no abuse of discretion given the conditional nature of the court's 404(b)(1) ruling. As the trial court made clear, the State was free to renew its application if the defense opened the door to this evidence at trial, and the possibility that Chyun's former client would be called to testify therefore remained.

Nelson's claim that the trial court erred when it granted Nelson's request to represent himself

After Chyun discovered the potential conflict in his representation of Nelson, OPA administratively reassigned the case to Assistant Public Advocate Joseph Van De Mark, who represented Nelson at the hearing on Chyun's motion to withdraw. Frustrated with the changing attorneys in his case, Nelson requested to proceed pro se. Van De Mark requested that Nelson's request be addressed in the expedited hearing that was being held on the motion to withdraw.

Immediately before that hearing, Van De Mark discussed the risks and benefits of proceeding pro se with Nelson. The trial judge then engaged in a lengthy colloquy with Nelson regarding his desire to proceed to trial pro se. The judge explained the dangers of self-representation and questioned Nelson about his educational background, general competence, and experience with criminal trials.

Following this colloquy, the trial judge found that Nelson was competent to represent himself and that his decision to waive counsel was knowingly and voluntarily made. The judge found, in particular, that Nelson was "presentable, articulate, well-spoken" and "[had] a grasp on his case and on [his] materials." The trial judge also found that, although Nelson's decision was undoubtedly motivated by his frustrations with the rotating attorneys, Nelson's decision was nevertheless knowing and voluntary.

Shortly after this hearing, the State filed a "motion for further factual inquiry" into Nelson's decision to waive counsel, attaching a checklist describing the dangers of proceeding pro se in a criminal case. At the next hearing, the judge informed the State that he had used this checklist in questioning Nelson, but he agreed to give Nelson the checklist to review, and to reexamine Nelson on his decision to represent himself. At a subsequent hearing, Nelson confirmed that he had read the checklist and

understood the dangers of self-representation, and he again confirmed that he wanted to represent himself.

Finally, at trial, shortly before the jury was sworn in, the judge once again asked Nelson if he wanted to delay trial and reconsider his decision to proceed pro se. Nelson again affirmed his decision to represent himself.

On appeal, however, Nelson contends that the trial court erred when it allowed him to represent himself. Nelson asserts that his educational history, employment history, and past experience in the criminal justice system rendered him incapable of effective self-representation. Nelson also argues that his decision to represent himself was not voluntary because it was clouded by his frustration with the forced withdrawal of his two previous attorneys.

Given the multiple advisements by the trial judge of the risks and dangers of proceeding pro se and Nelson's multiple waivers of his right to counsel, we find no merit to this claim.

We also reject, as a matter of law, Nelson's separate claim that he should have been advised as to the possibility that standby counsel could have been appointed to assist him in his self-representation. We recently addressed this issue in an unpublished memorandum, *Grim v. State*, in which we held that the trial judges are not required to expressly notify a defendant of the court's discretionary authority to appoint standby counsel before allowing the defendant to proceed pro se.[4]

[4] *See Grim v. State*, 2016 WL 482543, at *4 (Alaska App. Feb. 3, 2016), (unpublished).

Nelson's claim that the trial court abused its discretion when it limited Nelson's cross-examination of A.E. regarding her past drug and alcohol use and her status as a runaway

At trial, Nelson informed the trial judge that he wanted to cross-examine A.E. regarding a variety of topics, including her past alcohol and drug use history, her status as a runaway, and her Office of Children's Services records. Nelson argued that these topics were relevant to her credibility as a witness. The trial judge ruled that none of this information was relevant to Nelson's charged offenses. (He did, however, allow Nelson to question A.E. regarding whether she had smoked marijuana during the night in question.)

On appeal, Nelson argues that the court erred in excluding cross-examination on these topics. But we agree with the trial judge that this information had seemingly little relevance to the case. Moreover, Nelson failed to show that any of this evidence was actually admissible under the evidence rules.[5]

Nelson also argues that he should have been allowed to question A.E. about a prior incident that had occurred approximately thirty days before the charged incident in which A.E. allegedly assaulted an acquaintance while drinking. Nelson asserted that this past assault established that A.E. had "a history of doing violent acts against people when ... drinking."

Under Alaska law, a defendant who asserts that he acted in self-defense may support this claim in one of two ways: (1) by asserting that, even though the victim

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[5] *See* Alaska Evid. R. 608(b) ("Evidence of other specific instances of the conduct of a witness offered for the purpose of attacking or supporting that witness' credibility is inadmissible unless such evidence is explicitly made admissible by these rules[.]").

may not have been the initial aggressor, the defendant reasonably believed that the victim was about to attack; or (2) by asserting that the victim was, in fact, the initial aggressor.[6]

Where the defendant seeks to prove the reasonableness of his fear that the victim was about to attack, the defendant can introduce any evidence pertaining to his knowledge of the victim's violent propensities — provided that the defendant can show that he knew this information at the time of his altercation with the victim.[7]

Alternately, to prove that the victim was the first aggressor, a defendant may introduce evidence of the victim's *character* for violence, regardless of whether that character was known by the defendant at the time.[8] However, Alaska Evidence Rule 405 limits this to evidence of the victim's character for violence to reputation and opinion evidence; evidence of specific acts may not be used in this manner.[9]

Here, Nelson conceded that he had no knowledge of A.E.'s prior allegedly assaultive conduct — therefore, the prior assault was not relevant to Nelson's reasons for why he reacted the way he did. And although Nelson might have wanted to introduce A.E.'s prior assault to support his claim that A.E. was the first aggressor and attacked him, he was limited by Evidence Rule 405's requirement that the victim's character for violence be proved through reputation and opinion evidence, not evidence of specific acts.[10]

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[6] *See Allen v. State*, 945 P.2d 1233, 1239-43 (Alaska App. 1997); *McCracken v. State*, 914 P.2d 893, 898 (Alaska App. 1996).

[7] *Allen*, 945 P.2d at 1239-43; *McCracken*, 914 P.2d at 898.

[8] Alaska Evid. R. 404(a)(2); *McCracken*, 914 P.2d at 898.

[9] Alaska Evid. R. 405; *McCracken*, 914 P.2d at 898.

[10] *Allen*, 945 P.2d at 1239.

We therefore affirm the trial judge's decision to exclude this evidence at trial.

Whether the trial court erred by allowing the State to re-open its case after it allowed Nelson to introduce additional evidence

At trial, A.E. testified that the alcohol Nelson had given her was "clear" and tasted like vodka. When Nelson cross-examined A.E., he pointed out that the receipt recovered from his jacket on the night of the incident showed that he had purchased a bottle of "Castaway Cove Barb" — a dark rum. The receipt was later admitted as Exhibit J.

During his defense case, Nelson called a Public Defender Agency investigator who testified that she had subpoenaed the receipts from the liquor store on Nelson's behalf during the time the Public Defender Agency was representing Nelson in this case. After going through all the receipts that were generated at the store between 8:00 p.m. and midnight, she found the duplicate receipt to the receipt found in Nelson's jacket. The duplicate receipt was then marked as Exhibit Q for identification purposes. But it was not shown to the prosecutor; nor was it ever entered into evidence.

After the jury had retired to deliberate, the parties reviewed the exhibits that would go the jury and it became clear that Exhibit Q had never been admitted into evidence. Nelson acknowledged that the exhibit had never been admitted into evidence and he also acknowledged that he had not provided the State with a copy of the exhibit. Nelson nevertheless argued that the exhibit should be admitted as evidence (and go to the jury) because the exhibit was relevant to his claim that no one had purchased vodka that evening. The State objected, arguing that it had never been given a chance to review the exhibit and that it might have presented a different rebuttal case and a different closing argument if it had known that the exhibit would be admitted.

The trial judge ruled that Exhibit Q would be admitted into evidence under Alaska Rule of Evidence 803(23),[11] the residual hearsay exception, because "if Mr. Nelson had a modicum, a minimum of attorney assistance, in this matter ... he'd have called the right witness [necessary to admit the exhibit]." The judge also found that the State had not had adequate time to review the exhibit. The judge therefore gave the State a fifteen-minute recess to review the exhibit before making a final ruling on whether additional evidence or argument would be needed.

When the parties returned from recess, the prosecutor requested that the State be allowed to briefly reopen its case. She explained to the court that the two receipts were not identical. Exhibit J (the receipt recovered from Nelson's person) listed the purchase as "Castaway Cove Barb," while the liquor store's duplicate of this receipt included in Exhibit Q specified that the purchase was for "Castaway Cove Barb Silv." — which suggested that Nelson may have purchased "silver," or clear, rum. The prosecutor went on to explain that, during the break, a detective had walked to the same liquor store to purchase a bottle of rum with the same item number as listed on both receipts, and that the rum was indeed clear.

The trial judge found that this new evidence was relevant because Nelson had introduced these receipts and had argued that A.E.'s testimony was not credible because she insisted that she drank a clear, vodka-like drink.

Over Nelson's objection, the judge then permitted Detective Edward Gurtler to testify that (1) the duplicate receipt contained in Exhibit Q indicated that

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[11] Alaska Rule of Evidence 803(23) provides that the trial judge may admit a statement not otherwise admissible under the evidence rules if it is (a) offered as evidence of a material fact, (b) more probative on the point for which it is offered than any other evidence the defendant can procure through reasonable efforts and (c) the general purposes of the evidence rules are best served by the admission of the statement.

Nelson purchased clear rum, (2) Gurtler had just purchased a bottle of the same rum with the same item number, and (3) this new bottle of rum was clear in color. The bottle of rum was also admitted into evidence.

Nelson briefly cross-examined Detective Gurtler, who conceded that A.E. had testified that she recalled drinking something that tasted like vodka. Detective Gurtler also conceded that the bottle Nelson purchased months earlier could have been a different color from the one just purchased by the detective. Nelson did not request that the parties be allowed to argue the meaning of this new evidence to the jury; nor did he request any other relief.

Now on appeal, Nelson argues that his right to a fair trial was violated when the trial judge permitted the State to reopen its case and introduce this evidence. We find no merit to this claim because it was Nelson who insisted on having Exhibit Q admitted into evidence. We also question Nelson's claim that he was "surprised" by the State's rebuttal evidence given that he was the source of Exhibit Q, and therefore presumably aware of its discrepancy from the other receipt. Additionally, when the rebuttal evidence was admitted, Nelson was given the opportunity to cross-examine the detective and elicit testimony supportive of his defense — specifically, the fact that A.E. testified to drinking vodka, not rum. Nelson did not request to make any additional argument to the jury, nor did he request a continuance to respond to the State's rebuttal evidence. Given this record, we conclude that the trial court did not err in its handling of this matter.

Nelson's claim that the trial court erred by denying his motion to dismiss the furnishing alcohol to a minor charge

Prior to the jury retiring to deliberate, Nelson moved to dismiss the furnishing alcohol to a minor charge, arguing that he could not be convicted based solely on the testimony of A.E., who Nelson claimed was an "accomplice" to the underlying

charge. The superior court denied this motion, relying on well-established law that A.E. was not an accomplice under the law because "one is not an accomplice unless he could be charged with the same crime for which the defendant is prosecuted."[12]

We affirm the trial court's ruling on appeal. Nelson was in his mid-forties when he was charged with furnishing alcohol to a minor; A.E. was fourteen. As a matter of law, A.E. was not an accomplice to Nelson's crime.

Nelson's cumulative error claim

Lastly, Nelson argues that the court should reverse his convictions based on "cumulative error." Because none of Nelson's claims have resulted in any finding of error, there can be no cumulative error requiring reversal.[13]

Conclusion

The judgment of the superior court is AFFIRMED.

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[12] *Howard v. State*, 496 P.2d 657, 660 (Alaska 1972) (noting that, for instance, "[a] purchaser of illegally sold narcotics cannot ... [b]e an accomplice to the sale"); *see also* AS 11.16.120(b).

[13] *Roussel v. State*, 115 P.3d 581, 585 (Alaska App. 2005).